

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY T. RICE,

Petitioner,

v.

Case Number 19-12271

Honorable David M. Lawson

DANIEL LESATZ,

Respondent.

ORDER GRANTING MOTION TO HOLD PETITION IN ABEYANCE

The petitioner, Timothy Treshaen Rice, who presently resides at the Baraga Correctional Facility in Baraga, Michigan, filed a *pro se* application for a writ of habeas corpus under 28 U.S.C. § 2254. On that same date, he also filed a motion to stay the matter and hold his petition in abeyance, so that he might return to state court to exhaust certain claims. The Court now finds that the request for a stay is lawful and should be granted.

I.

The petitioner was convicted of second-degree murder, Mich. Comp. Laws § 750.317, felon in possession of a firearm, Mich. Comp. Laws § 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), Mich. Comp. Laws § 750.227b, following a jury trial in the Wayne County, Michigan circuit court. He was sentenced to concurrent prison terms of 30 to 60 years for his second-degree murder conviction and 40 to 60 months for his felon in possession conviction, and a consecutive sentence of the mandatory two-year term of imprisonment for the felony-firearm conviction. The Michigan Court of Appeals affirmed the petitioner's conviction, *People v. Rice*, No. 333634, 2018 WL 1342431 (Mich. Ct. App. Mar. 15, 2018), and on July 27, 2018, the Michigan Supreme Court denied the petitioner's application for leave to appeal, *People v. Rice*, 502 Mich. 940, 915 N.W.2d 469 (2018).

On July 29, 2019, the petitioner filed his habeas petition in which he raised several claims of error in the criminal proceedings, arguing that his trial counsel was ineffective by: (1) failing to call the petitioner's brother as a witness; (2) failing to present a case of self-defense; (3) failing to examine certain evidence; and (4) refusing to allow the petitioner to testify. The petitioner also argues that the trial court erred in failing to give a self-defense instruction to the jury. Those claims all were exhausted in the course of the petitioner's direct appeal. He now seeks to return to the state courts to present four additional claims that: (1) appellate counsel was ineffective by failing to raise and preserve certain constitutional claims; (2) appellate counsel was ineffective by neglecting the petitioner's appeal as of right; (3) the petitioner's convictions should be overturned because plain error occurred that affected his substantial rights or undermines the outcome of the state court proceedings; and (4) the petitioner has obtained newly discovered evidence in the form of an affidavit. The petitioner has not exhausted his available state court remedies for any of those new claims, because he has not yet presented them to any state court.

II.

The doctrine of exhaustion of state remedies requires state prisoners to "fairly present" their claims as federal constitutional issues in the state courts before raising those claims in a federal habeas corpus petition. *See* 28 U.S.C. § 2254(b)(1)(A), (c); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *McMeans v. Brigano*, 228 F.3d 674, 680-81 (6th Cir. 2000); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). The exhaustion requirement is satisfied if a prisoner invokes one complete round of the state's established appellate review process, including a petition for discretionary review to a state supreme court. *See O'Sullivan*, 526 U.S. at 845, 847. A prisoner "'fairly presents' his claim to the state courts by citing a portion of the Constitution, federal decisions using constitutional analysis, or state decisions employing constitutional analysis in similar fact

patterns.” *Levine v. Torvik*, 986 F.2d 1506, 1516 (6th Cir. 1993); *see also Prather v. Rees*, 822 F.2d 1418, 1420 (6th Cir. 1987) (“Ordinarily, the state courts must have had the opportunity to pass on defendant’s claims of constitutional violations”). A Michigan petitioner must present each ground to both Michigan appellate courts before seeking federal habeas corpus relief. *Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009); *Mohn v. Bock*, 208 F. Supp. 2d 796, 800 (E.D. Mich. 2002); *see also Hafley v. Sowders*, 902 F.2d 480, 483 (6th Cir. 1990). The petitioner bears the burden of showing that his state court remedies have been exhausted. *Rust*, 17 F.3d at 160.

The Supreme Court has held that the filing of a federal habeas corpus petition does not suspend the running of the one-year limitations period under 28 U.S.C. § 2244(d)(2). *See Duncan v. Walker*, 533 U.S. 167, 181-82 (2001). However, the Supreme Court’s decision in *Duncan* does not prevent district courts from “retain[ing] jurisdiction over a meritorious claim and stay[ing] proceedings pending the complete exhaustion of state remedies,” or from “deeming the limitations period tolled for [a habeas] petition as a matter of equity.” *Id.* at 182-83 (Stevens, J., concurring). The Supreme Court nonetheless has cautioned that a stay is “available only in limited circumstances,” such as “when the district court determines there was good cause for the petitioner’s failure to exhaust his claims first in state court,” the unexhausted claims are not “plainly meritless,” and the petitioner is not “engage[d] in abusive litigation tactics or intentional delay.” *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005).

The Sixth Circuit has advised that it is preferable for a district court to dismiss the unexhausted claims, retain jurisdiction over the exhausted claims, and stay proceedings pending exhaustion where to do otherwise would jeopardize the timeliness of a subsequent petition. *See Griffin v. Rogers*, 308 F.3d 647, 652 & 652 n.1 (6th Cir. 2002); *see also Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002) (finding it “eminently reasonable” to dismiss unexhausted claims in

a habeas petition and stay proceedings on the remaining claims pending exhaustion of state court remedies). The court of appeals reiterated this point in its decision in *Cunningham v. Hudson*, 756 F.3d 486 (6th Cir. 2014):

“[I]f the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics . . . the district court should stay, rather than dismiss, the mixed petition.” [*Rhines v. Weber*, 544 U.S.] at 278, 125 S. Ct. 1528. This is because “[i]n such circumstance, . . . the petitioner’s interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions.” *Id.*; *see also Wagner*, 581 F.3d at 419 (considering a mixed habeas petition and “not[ing] that Petitioner’s claims, particularly the unexhausted claims, are not ‘plainly meritless,’” so “assuming Petitioner can show good cause for failing to present these claims to the state court in the first instance, we see no reason why the district court should not grant a ‘stay and abeyance’ while Petitioner exhausts in state court, should Petitioner opt against dismissing his unexhausted claims.” (citation and footnotes omitted)).

756 F.3d at 486.

The Michigan Court Rules provide a process by which the petitioner may raise his unexhausted claims. The petitioner may file a motion for relief from judgment under Subchapter 6.500 of the Michigan Court Rules, which allows the trial court to appoint counsel, seek a response from the prosecutor, expand the record, permit oral argument, and conduct an evidentiary hearing on the petitioner’s claim. The petitioner may appeal the trial court’s disposition of his motion for relief from judgment to the Michigan Court of Appeals and the Michigan Supreme Court, and she may thereafter file a petition for writ of *certiorari* in the United States Supreme Court. To obtain relief in state court, he will have to show cause for failing to raise his unexhausted claims on direct review and resulting prejudice or a significant possibility of innocence. *See Mich. Ct. R. 6.508(D)(3)*. However, he would have to make a similar showing here if the Court concluded that there was no state remedy to exhaust. *Gray v. Netherland*, 518 U.S. 152, 161-62 (1996); *Hannah v. Conley*, 49 F.3d 1193, 1195-96 & 1196 n.3 (6th Cir. 1995); *Rust*, 17 F.3d at 160.

The statute of limitations under 28 U.S.C. § 2244(d)(1) should give the petitioner cause for concern. The Michigan Supreme Court denied the petitioner's application for leave to appeal on July 27, 2018. That decision became final on October 25, 2018, when the time during which the petitioner could have filed a petition for a writ of *certiorari* in the United States Supreme Court expired. The one-year limitations period commenced on the following day, October 26, 2018. *See Bronaugh v. Ohio*, 235 F.3d 280, 284-85 (6th Cir. 2000) (holding that the last day on which a petitioner can file a petition for a writ of *certiorari* in the United States Supreme Court is not counted toward the one-year limitations period applicable to habeas corpus petitions). The petitioner filed the present petition on July 29, 2019, just 89 days before the limitations period ran out, and he filed his motion to stay and hold the petition in abeyance on that same date. If the Court were to dismiss the petition without prejudice, then any subsequently filed petition likely would be untimely by the time the state court proceedings on the new claims were concluded and the petitioner returned to this Court to pursue them.

The Court, therefore, will grant the petitioner's request to hold the petition in abeyance while he returns to the state courts to exhaust his additional claims. All of the claims raised in the original petition have been exhausted, but the new claims that the petitioner describes in his motion to stay have not. The petitioner's claims do not appear to be "plainly meritless," *Wagner v. Smith*, 581 F. 3d 410, 419 (6th Cir. 2009), and he may argue that he did not previously raise these claims in the state courts due to the ineffective assistance of his trial and appellate counsel. *Id.*, at 419, n.4 & 5. It does not appear that the petitioner has engaged in "intentionally dilatory tactics."

However, even where a district court determines that a stay is appropriate pending exhaustion of state court remedies, the district court "should place reasonable time limits on a petitioner's trip to state court and back." *Rhines*, 544 U.S. at 278. Therefore, to ensure that there

are no delays by the petitioner in exhausting his state court remedies, the Court will impose upon the petitioner time limits within which he must pursue post-conviction relief from the state courts. *See Palmer v. Carlton*, 276 F. 3d 777, 781 (6th Cir. 2002). The petitioner promptly must initiate any further proceedings in the state courts, within 28 days after the entry of this order, and he must ask this Court to lift the stay within 28 days after exhausting his state court remedies.

III.

Accordingly, it is **ORDERED** that the petitioner's motion to stay the proceedings and hold the petition in abeyance (ECF No. 2) is **GRANTED**, and the proceedings in this matter are **STAYED** pending the resolution of the state court proceedings.

It is further **ORDERED** that the petitioner promptly must pursue any post-conviction or further appellate proceedings relating to his unexhausted claims, by properly submitting appropriate filings to the state court **on or before September 11, 2019**.

It is further **ORDERED** that the petitioner must file an amended petition in this Court within twenty-eight (28) days after the conclusion of the state court proceedings. If the petitioner timely files an amended petition, then the respondent shall file an answer addressing the allegations in the petition in accordance with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts within fifty-six (56) days thereafter. If the petitioner returns to federal court with an amended petition, following exhaustion of his state court remedies, he must use the same caption and case number as appears on this order.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Date: August 14, 2019

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on August 14, 2019.

s/Susan K. Pinkowski
SUSAN K. PINKOWSKI